

On March 6, 1997 appellant, then a 55-year-old property book officer, sustained injury while lifting. He felt severe low back pain and pain in his right and left legs and feet. On

May 13, 1997 the Office accepted appellant's claim for aggravation of low back strain with sciatica. Appellant's claim was also accepted for aggravation of lumbosacral degenerative disease, aggravation of lumbar spinal stenosis and lumbar disc excision on April 8 1998. He received compensation for wage loss on the periodic rolls.

On September 19, 2006 the Social Security Administration (SSA) notified the Office that effective February 1, 2004 appellant's SSA rate was \$1,002.60 with Federal Employees' Retirement System (FERS) benefits and \$799.60 without. Effective December 1, 2004, appellant's SSA rate was \$1,029.60 with FERS benefits and \$821.20 without. Effective December 1, 2005, his SSA rate was \$1,071.80 with FERS and \$854.80 without. The monthly difference was \$203.00, \$208.40 and \$217.00 respectively. Multiplying each figure by 12 and dividing by 13 to convert the monthly difference to a 28-day difference (the Office paid compensation every 28 days), the Office determined that it should have offset appellant's compensation benefits by \$187.38 from February 1 through November 30, 2004, \$192.37 from December 1, 2004 through December 1, 2005 and \$200.31 from December 1, 2005 through September 2, 2006. The Office determined that this resulted in an overpayment of \$6,516.59 from February 1, 2004 through September 2, 2006.

By letter dated October 2, 2006, the Office informed appellant that an individual cannot receive benefits under the Federal Employees' Compensation Act and Office of Personnel Management benefits for the same period of time. It informed appellant that for any period that a beneficiary receives SSA benefits based on federal service, compensation benefits are reduced by the amount of SSA benefits attributable to the federal service of the employee. The Office informed appellant that beginning September 3, 2006 his benefits would be adjusted accordingly.

On February 21, 2007 the Office made a preliminary determination that appellant received an overpayment in the amount of \$6,516.59 because he received social security retirement benefits effective February 2004. It noted that these benefits were partially computed upon credits that were earned while appellant was working for the Federal Government but that the Office did not adjust for the social security benefits until September 3, 2006. As appellant could not receive a government retirement benefit concurrently with benefits under the Act, the Office found that an overpayment occurred from February 1, 2004 through September 2, 2006. The Office further found that appellant was not at fault in creating the overpayment and provided instructions for disagreeing with the fact that the overpayment occurred or the amount and how to request a waiver. No response was received from appellant.

By decision dated February 5, 2008, the Office finalized its preliminary determination that appellant received an overpayment of compensation in the amount of \$6,516.59. It found that, although appellant was without fault in the creation of the overpayment, he did not contest the finding or request waiver. The Office determined that it would deduct \$250.00 from continuing compensation payments to recover the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Act provides for limitations on the right to receive compensation and states in pertinent part:

“(d) Notwithstanding the other provisions of this section, an individual receiving benefits for disability or death under this subchapter who is also receiving benefits under [S]ubchapter [3] of [C]hapter 84 of this title or benefits under [T]itle [2] of the [SSA] shall be entitled to all such benefits, except that”

* * *

“(2) in the case of benefits received on account of age or death under [T]itle [2] of the [SSA], compensation payable under this subchapter based on the [f]ederal service of an employee shall be reduced by the amount of any such social security benefits payable that are attributable to [f]ederal service of that employee covered by [C]hapter 84 of this title....”¹

FECA Bulletin No. 97-9 states:

“FECA benefits have to be adjusted for the FERS portion of SSA benefits. The portion of the SSA benefit earned as a [f]ederal employee is part of the FERS retirement package and the receipt of FECA benefits and [f]ederal retirement concurrently is a prohibited dual benefit.”²

ANALYSIS -- ISSUE 1

The record supports that appellant received full compensation benefits together with SSA benefits from February 1, 2004 through September 2, 2006. The portion of the SSA benefits earned as a federal employee is part of the FERS retirement package and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.³ The SSA notified the Office of the applicable SSA rates for appellant and their effective dates. The Office was able to calculate the dual benefit he received from February 1, 2004 through September 2, 2006. The Board has reviewed these calculations. From February 1, 2004 through November 30, 2004 the Office properly determined that appellant was overpaid at the rate of \$187.38 every 28 days. Dividing this figure by 28 and multiplying it by 276 days, the Board notes that appellant was overpaid \$2,034.46 for this period, as found by the Office. For the period December 1, 2004 through November 30, 2005, the Office properly determined that appellant was overpaid \$192.37 every 28 days, resulting in an overpayment of \$2,507.68 (\$192.37 divided by 28 and multiplied by 365 days). For the period December 1, 2005 through September 2, 2006, it properly determined that appellant was overpaid at a rate of \$200.31 every

¹ 5 U.S.C. § 8116(d)(2); *see also* 20 C.F.R. § 10.421(d); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4e, 11(a)-(b) (February 1995); FECA Bulletin No. 97-9 (issued February 3, 1997).

² FECA Bulletin No. 97-9 (issued February 3, 1997).

³ *Id.*

28 days for a total overpayment of \$1,974.48 (200.31 divided by 28 multiplied by 276 days). The total overpayment as calculated by the Office (\$2,034.46 plus \$2,507.68 plus \$1,974.48) equals \$6,516.62. As it determined that appellant received an overpayment of \$6,516.59, the Board finds that the Office properly found that appellant had received an overpayment in that amount.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁴ If it finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁵

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.⁶ Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.⁷

ANALYSIS -- ISSUE 2

The Office found that appellant was not at fault in creating this overpayment. Although appellant was without fault in creating the overpayment, he nonetheless bears responsibility for requesting waiver and providing the financial information necessary to support any request for waiver of the overpayment. Because appellant failed to request waiver or submit any financial information, the Office properly applied its federal regulation to deny waiver.

LEGAL PRECEDENT -- ISSUE 3

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information will be used to determine the repayment schedule, if necessary.⁸

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the

⁴ 20 C.F.R. § 10.433(a).

⁵ *Id.* at § 10.434.

⁶ *Id.* at § 10.438(a).

⁷ *Id.* at § 10.438(b).

⁸ *Id.* at § 10.438.

error is discovered or his or her attention is called to the same. If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.⁹

ANALYSIS -- ISSUE 3

In the instant case, appellant did not provide any financial information which would assist the Office in determining the amount to deduct from future compensation payments in order to recoup the overpayment. The Office set the rate of recovery as \$250.00 from each continuing compensation payment until the benefit was paid in full. The Board finds that this was reasonable in the absence of any financial documentation proving otherwise.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$6,516.59 for the period February 1, 2004 through September 2, 2006, properly denied waiver of the recovery of this overpayment; and properly set the rate of recovery of the overpayment at \$250.00 from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 17, 2008 is affirmed.

Issued: January 28, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁹ *Id.* at § 10.441(a).